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No. 89-1426

In the Supreme Court of the United States

OCTOBER TERM, 1989

MICHAEL ROBERT LAYKIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether knowledge that a mortgage is backed by a federal agency is an element of a violation of 12 U.S.C. 1709-2 (1982), which bars equity skimming on mortgages issued or guaranteed by the Department of Housing and Urban Development or the Veterans Administration.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Huddleston v. *United States*, 415 U.S. 814 (1974)	6
Liparota v. *United States*, 471 U.S. 419 (1985)	6, 7, 10
Morissette v. *United States*, 342 U.S. 246 (1951)	7
United States v. *Ardito*, 782 F.2d 358 (2d Cir.), cert. denied, 475 U.S. 1141 (1986)	8
United States v. *Blassingame*, 427 F.2d 329 (2d Cir. 1970), cert. denied, 402 U.S. 945 (1971)	8-9
United States v. *Capano*, 786 F.2d 122 (3d Cir. 1986)	11
United States v. *Feola*, 420 U.S. 671 (1975)	6, 7, 8
United States v. *Johnson & Towers, Inc.*, 741 F.2d 662 (3d Cir. 1984)	9, 10, 11
United States v. *Montoya*, 716 F.2d 1340 (10th Cir. 1983)	8
United States v. *Nofziger*, 878 F.2d 442 (D.C. Cir.), cert. denied, 110 S. Ct. 564 (1989)	9, 10
United States v. *Sorrow*, 732 F.2d 176 (11th Cir. 1984)	9
United States v. *Speir*, 564 F.2d 934 (10th Cir. 1977), cert. denied, 435 U.S. 927 (1978)	8
United States v. *Yermian*, 468 U.S. 63 (1984)	6, 7, 8

Statutes: Page

Ethics in Government Act of 1978, 18 U.S.C. 207(c) 10
12 U.S.C. 1709-2 ..... 2, 4, 5, 6
12 U.S.C. 1715z-4 11
18 U.S.C. 111 7
18 U.S.C. 287 8
18 U.S.C. 371 2
18 U.S.C. 641 8
18 U.S.C. 1001 7
18 U.S.C. 1343 8
18 U.S.C. 1503 8
42 U.S.C. 6928(d) 10
42 U.S.C. 6928(d)(2)(B) 10

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-27) is reported at 886 F.2d 1524.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 1989. A petition for rehearing was denied on December 7, 1989. The petition for a writ of certiorari was filed on March 7, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Nevada, petitioner was convicted of

equity skimming, in violation of 12 U.S.C. 1709-2, and conspiracy to commit equity skimming, in violation of 18 U.S.C. 371.[1] He was sentenced to a total of six months' imprisonment, five years' probation, a period of community service, and restitution. The court of appeals affirmed. Pet. App. 1-27.

1. Petitioner and Robert Terry were principal officers in the T.L. Corporation. In conjunction with a Century 21 office owned by Terry, the company acquired more than 100 single family residences in the Las Vegas, Nevada, area. Dennis Crain, an independent agent working for T.L. Corporation, identified the properties for purchase, and petitioner negotiated the sales. Pet. App. 5.

T.L. Corporation purchased homes with existing mortgages and agreed to make the payments on those mortgages. The sales were negotiated so that the original mortgage lenders were not apprised of the sales. If the seller

[1] 12 U.S.C. 1709-2 provides, in pertinent part:

> Whoever, with intent to defraud, willfully engages in a pattern or practice of –
>
> (1) purchasing one- to four-family dwellings (including condominiums and cooperatives) which are subject to a loan in default at time of purchase or in default within one year subsequent to the purchase and the loan is secured by a mortgage or deed of trust insured or held by the Secretary of Housing and Urban Development or guaranteed by the Veterans' Administration, or the loan is made by the Veterans' Administration,
>
> (2) failing to make payments under the mortgage or deed of trust as the payments become due, regardless of whether the purchaser is obligated on the loan, and
>
> (3) applying or authorizing the application of rents from such dwellings for his own use,
>
> shall be fined not more than $250,000 or imprisoned not more than 5 years or both. * * * Nothing in this section shall apply to the purchaser of one such dwelling.

had equity in his home, T.L. Corporation gave him a note for the amount of the equity, secured by a deed of trust. The note provided for monthly interest payments and a balloon payment for the capital after a term of years. Pet. App. 5-6. The properties that T.L. Corporation purchased were then put on the rental market.

Century 21 managed the properties and collected the rents but was not permitted to make the mortgage payments. After deducting a 10% fee and the funds necessary to maintain the upkeep on the properties, Century 21 remitted the remainder of the rental proceeds to petitioner or Terry. Despite the agreement by T.L. Corporation to make the mortgage payments, no mortgage payments on the properties were made. Pet. App. 6.

In August 1985, the former homeowners began to complain to the rental office that they were receiving notices from their mortgage lenders that payment had not been made on their mortgages. Because T.L. Corporation had not assumed the mortgages, the lenders informed the former owners that they were still liable on those debts. Century 21 informed petitioner of the complaints, but neither petitioner nor Terry made the payments. After October 1985, Century 21 refused to manage T.L. Corporation's properties. Pet. App. 6.

Crain then contracted with another rental agent, PM Corporation, to manage the properties. PM Corporation was directed to remit the excess rental payments into its own trust account instead of paying them directly to petitioner. Later, petitioner directed the rental agents to send funds to various people, to write checks totalling $9,000 directly to him or to companies controlled by him, and to issue checks totalling $2,000 to Crain. Pet. App. 6-7.

PM Corporation began to receive complaints from former homeowners about nonpayment of mortgages and eventually resigned as rental agent. By the winter of 1985,

most of the homes owned by T.L. Corporation were in foreclosure proceedings. Six of the properties had mortgages that were insured by the Veterans Administration (VA) or the Federal Housing Administration (FHA). The mortgages on those properties went into default, resulting in losses of more than $100,000 to the federal government. Pet. App. 7. Petitioner and Crain were then tried and convicted on charges of equity skimming.

2. The court of appeals upheld petitioner's conviction. It rejected petitioner's argument that Section 1709-2 is ambiguous as to whether a defendant has to know that a federal agency insured the loans, and that the "rule of lenity" therefore requires that such knowledge be charged and proved. Pet. App. 9. The court stated that "[o]n its face, the statute does not require such knowledge; and there appears to be no reason that it should." Pet. App. 11. The court stated that the statutory requirement that the mortgages be insured by a federal agency is a jurisdictional provision of the kind as to which knowledge is normally not required. In addition, the court noted that the structure of the statute is consistent with that interpretation, because the phrases setting forth the mental elements of the crime are set off from the language requiring that the loans be guaranteed or held by the federal government. Pet. App. 8-14.[2]

[2] The court of appeals also rejected petitioner's challenges to the sufficiency of the evidence, the sufficiency of the indictment, the admission of evidence involving another equity skimming operation, and the jury instructions. Pet. App. 14-27. Petitioner does not renew these arguments before this Court except insofar as they relate to his contention that knowledge of the federal guarantee on the mortgage is an element of the equity skimming offense.

ARGUMENT

Petitioner renews his contention (Pet. 6-17) that Section 1709-2 requires proof that he knew the mortgages on his property were guaranteed or held by the FHA or the VA, and that his conviction must be reversed because the indictment did not charge, and the jury was not required to find, that he possessed that knowledge. The court of appeals correctly decided that issue, and its decision does not conflict with any decision of this Court or of any other court of appeals.

1. The structure of Section 1709-2 supports the court of appeals' conclusion that knowledge that mortgages are backed by the FHA or VA is not an element of a violation of Section 1709-2. The statute contains two *mens rea* requirements: acting with an intent to defraud, and "willfully engag[ing] in a pattern or practice" of purchasing dwellings subject to a loan that is in default or goes into default within a year, failing to make mortgage payments on the dwellings, and appropriating the rental income from the properties. The reference to the federal nexus is part of a separate clause in the statute that requires that "the loan [be] secured by a mortgage or deed of trust insured or held by [HUD] or guaranteed by the [VA] or the loan is made by the [VA]." The natural reading of the statute is that the defendant must willfully engage in the proscribed pattern or practice, but that no willfulness or knowledge must attach to the facts establishing the federal nexus. As the court of appeals observed (Pet. App. 13),

> the term 'willfully' is part of a disjunctive sentence. The natural reading of the sentence is that the defendant must willfully participate in a pattern of purchasing one- to four-family dwellings, *and*, in addition, that the houses must be insured by the federal govern-

ment. The final clause is a separate component not modified by a knowledge requirement."[3]

Because the plain language of the statute rebuts petitioner's proposed construction, petitioner's reliance (Pet. 7) on the rule of lenity is misplaced. The rule of lenity does not mandate that criminal statutes be given the narrowest possible construction; rather, it applies only when a criminal statute is ambiguous. Because Section 1709-2 admits of only one plausible construction, the rule of lenity is inapplicable here. See *United States* v. *Yermian*, 468 U.S. 63, 70 n.7 (1984); *Huddleston* v. *United States*, 415 U.S. 814, 831-832 (1974).

2. The conduct reached by Section 1709-2 is plainly improper, quite apart from whether the defendant knew that the mortgages were federally guaranteed. Section 1709-2 punishes a form of theft involving the appropriation of a third party's money or property for one's own use, and requires that the conduct be undertaken with an "intent to defraud." In that respect, this case closely resembles *United States* v. *Feola*, 420 U.S. 671, 693-694 (1975). In *Feola*, the Court held that knowledge that the

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[3] The structure of Section 1709-2 can be contrasted, for example, with the phrasing of the statute at issue in *Liparota* v. *United States*, 471 U.S. 419, 420 (1985). In *Liparota*, the defendant's conviction under a federal statute prohibiting the misuse of food stamps was overturned because the government had failed to prove that the defendant knew his use was unlawful. The key provision penalized anyone who "knowingly uses, transfers, acquires, alters, or possesses [food stamps] in any manner not authorized by the statute or the regulations." The structure of that statute, in which the adverb describing the requisite state of mind modifies one continuous phrase containing the requirement of lack of authorization, is quite different from the structure of Section 1709-2, in which the description of the types of mortgages that can be the subject of a violation is contained in a separate clause, with a new subject and predicate, from the modifier "willfully."

intended victim was a federal officer was not a prerequisite for the crime of assault on a federal officer in violation of 18 U.S.C. 111, or conspiracy to assault a federal officer. The court observed that "[t]he situation is not one where legitimate conduct becomes unlawful solely because of the identity of the individual or agency affected." 420 U.S. at 685. Because the conduct punished by the statute was inherently wrongful, the absence of a requirement of knowledge of the identity of the person assaulted posed "no risk of unfairness to defendants" and created "no snare for the unsuspecting." *Ibid.*[4]

3. An additional factor supporting the ruling of the court of appeals is that the provision as to which the court found no requirement of knowledge is a jurisdictional element, and this Court and others have routinely held that federal statutes need not be construed to require knowledge of jurisdictional elements. In *United States* v. *Yermian*, 468 U.S. 63, 68 (1984), the Court held that 18 U.S.C. 1001, which criminalizes lying to a federal agency in any matter within its jurisdiction, embodies a *mens rea* requirement that does not depend on the defendant's

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[4] In this respect as well, this statute differs from the statute at issue in *Liparota* v. *United States*, *supra*. If the statute in that case were not construed to require knowledge that the food stamp transaction was unauthorized, it would encompass "a broad range of apparently innocent conduct." 471 U.S. at 426. Since "criminal offenses requiring no *mens rea* have a 'generally disfavored status,' " *ibid.* (citing, *inter alia*, *Morissette* v. *United States*, 342 U.S. 246, 252-253 (1952)), the Court in *Liparota* was reluctant to construe Section 2024(b)(1) to dispense with any requirement of criminal intent in the absence of unequivocal indication of Congress's intent to create such a proscription.

knowledge of federal agency jurisdiction. The Court held that the primary purpose of the jurisdictional element "is to identify the factor that makes the false statement an appropriate subject for federal concern." 468 U.S. at 68. The Court added that "[j]urisdictional language need not contain the same culpability requirement as other elements of the offense." *Ibid.*; see also *United States* v. *Feola*, 420 U.S. at 685 ("criminal intent does not * * * require that the actor understand not only the nature of his act but also its consequence for the choice of a judicial forum"). The courts of appeals have confirmed that knowledge of the circumstance that confers federal jurisdiction is not ordinarily an element of a federal criminal statute. See, *e.g.*, *United States* v. *Ardito*, 782 F.2d 358, 360-362 (2d Cir.) (knowledge that proceeding is federal not required under obstruction of justice statute, 18 U.S.C. 1503), cert. denied, 475 U.S. 1141 (1986); *United States* v. *Montoya*, 716 F.2d 1340, 1344-1345 (10th Cir. 1983) (knowledge of federal status not required under false claims statute, 18 U.S.C. 287); *United States* v. *Speir*, 564 F.2d 934, 937-938 (10th Cir. 1977) (en banc) (knowledge of government ownership of property not required under federal theft statute, 18 U.S.C. 641), cert. denied, 435 U.S. 927 (1978); *United States* v. *Blassingame*, 427 F.2d 329 (2d Cir. 1970) (knowledge of interstate character of wire use not needed for violation of wire fraud statute, 18 U.S.C. 1343), cert. denied, 402 U.S. 945 (1971).[5]

[5] Petitioner claims (Pet. 9-11) that the requirement of VA or FHA insurance is not "jurisdictional" because Congress could have enacted a broader equity skimming statute that covered mortgages held by a

The court of appeals in *United States* v. *Sorrow*, 732 F.2d 176, 178 (11th Cir. 1984) employed a similar analysis to conclude that a conviction for conspiracy to defraud the United States in violation of 18 U.S.C. 371 required only that the "defendant's actions support[] a finding he intended to defraud, without a showing that he was aware of the federal interest which might be affected." 732 F.2d at 177. The court stated (*id.* at 178-179):

> Congress' inclusion of the target offense of defrauding the United States in section 371 evidences a concern with protecting the federal fisc. The desire to protect the federal treasury, like the desire to protect federal officers [as in *Feola*], would be unduly and arbitrarily circumscribed by a [*sic*] requiring proof of anti-federal intent. Whether persons who plan to defraud the United States in fact realize that federal dollars are the object of their scheme is irrelevant to the goal of safeguarding federal fiscal resources. Convicting such persons without requiring proof of anti-federal intent would not convert section 371 into a "snare for the unsuspecting." Fraud, like assault, involves wrongful conduct.

4. Contrary to petitioner's suggestion (Pet. 14-16), the decisions of the courts of appeals in *United States* v. *Nofziger*, 878 F.2d 442 (D.C. Cir.), cert. denied, 110 S. Ct. 564 (1989), and *United States* v. *Johnson & Towers, Inc.*, 741 F.2d 662 (3d Cir. 1984), are not in conflict with the decision in this case. For one thing, neither *Nofziger* nor *Johnson & Towers* involved the question whether a statute

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federally chartered bank. But a requirement that defines the scope of a crime need not be as broad as possible in order for that requirement—here, that the mortgages be backed by the FHA or the VA—to serve to create the interest that establishes federal jurisdiction.

required knowledge of a federal jurisdictional requirement. In *Nofziger*, the court held that a former government official cannot be held to violate the Ethics in Government Act of 1978, 18 U.S.C. 207(c), unless he knows that the particular matter on which he makes a communication is pending before his former agency. See 878 F.2d at 445-446. The court reached that conclusion because it found the statute to be ambiguous and because dispensing with the requirement of knowledge on the issue of the pendency of the matter on which the defendant was communicating "would be to criminalize a broad range of apparently innocent conduct." 878 F.2d at 453 (quoting *Liparota*, 471 U.S. at 426). Here, in contrast, the pertinent statutory language (which sets apart the background condition that a mortgage be federally insured in a separate phrase) is not ambiguous, and the degree of blameworthiness of the conduct does not turn on the defendant's knowledge of the federal connection with the mortgages.

In *Johnson & Towers*, 741 F.2d at 665, the court construed 42 U.S.C. 6928(d), which penalizes "[a]ny person who * * * (2) knowingly treats, stores, or disposes of any hazardous waste * * * (A) without having obtained a permit * * * or (B) in knowing violation of any material condition or requirement of such permit." The court held that the term "knowingly" in that provision applied to the failure to obtain a permit. The court concluded that any other construction would be "arbitrary and nonsensical." Subsection (2)(B) of the statute, the court noted, imposes a penalty for handling hazardous waste in violation of any condition embodied in a permit only if that violation is "knowing." The court reasoned that it would make little sense "to subject to criminal prosecution those persons who acted when no permit had been obtained irrespective of their knowledge (under subsection (A)), but not those persons who acted in violation of the terms of a permit

unless that action was knowing (subsection (B))." 741 F.2d at 668. The decision in *Johnson & Towers* thus turned on unique features of the statute at issue; the court's analysis has little bearing on the provision at issue here.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1990

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[6] Likewise, petitioner's reliance (Pet. 8) on *United States* v. *Capano*, 786 F.2d 122 (3d Cir. 1986), for the proposition that Section 1709-2 is ambiguous is misplaced. In *Capano*, the Court held merely that the statute barring equity skimming of multi-family houses, 12 U.S.C. 1715z-4, is ambiguous with respect to the question whether it applies even though the mortgagor did not receive an extension of time to cure the default. *Capano* thus has no bearing on the question presented here.

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